Dream Property Sdn Bhd v Atlas Housing Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J–02–1160 OF 2006
ZULKEFLI, LOW HOP BING AND ZAINUN ALI JJCA
2 NOVEMBER 2007

Civil Procedure — Summary judgment — Construction of contract — Whether suitable for determination without full trial of action — Rules of the High Court 1980 O 14A

Civil Procedure — Summary judgment — Determination of question of law or construction of document — Determination of date of vacant possession — Whether issue when vacant possession was to be given to defendant was a question of fact, or question of law or construction — Ambit of O 14A — Whether defence must first be filed before court could hear application under O 14A — Rules of the High Court 1980 O 14A

By a written agreement dated 19 November 2004 ('the agreement') entered between the plaintiff and the defendant, the plaintiff agreed to sell to the defendant a piece of land held under Geran 101840 Lot 325, Mukim Simpang Kanan, District of Batu Pahat, Johor ('the property') for RM33,500,000 ('purchase price'), and the defendant agreed to purchase the same subject to the terms and conditions as agreed by the parties. One of the terms and conditions of the agreement provided that, the plaintiff shall be given nine months from the date of the agreement to relocate a Chinese school built on the property ('the school') in order to hand over vacant possession of the property to the defendant. It was also a term of the agreement that, from the date the plaintiff confirms in writing that vacant possession of the property is ready to be delivered to the defendant and upon inspection and confirmation by the defendant, the defendant shall have four months to settle the balance purchase price to the plaintiff, with an automatic extension of two months on condition that the defendant shall pay late interest to the plaintiff. The plaintiff claimed that vacant possession of the school, hence the property, was delivered to the defendant on 21 November 2005. However, the defendant contended that vacant possession of the school was not delivered to the defendant on 21 November 2005, but instead on 28 February 2006. The plaintiff proceeded to file an action against the defendant in the court below, and in its action, the plaintiff claimed against the defendant, inter alia: (1) a declaration that vacant possession of the

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property had been delivered by the plaintiff to the defendant on 21 November 2005; and (2) a declaration that the defendant had failed to pay to the plaintiff the balance purchase price and the interest for the extended period on or before 21 May 2006, and therefore, the deposit of 10% of the purchase price paid by the defendant was forfeited by the plaintiff. The plaintiff thereafter filed an application under O 14A of the Rules of the High Court 1980 ('the RHC') vide summons in chambers dated 12 September 2006 ('the plaintiff's O 14A application') for the court to determine the date of delivery of vacant possession of the school (hence, the property) to the defendant. The defendant opposed the plaintiff's O 14A application, inter alia, on the ground that there was a dispute as to the material facts which was evident from the parties' affidavits and therefore the action was not suitable to be determined under O 14A of the RHC. It was also the defendant's contention that the plaintiff's O 14A application had failed to satisfy the prerequisites of O 14A of the RHC for the action to be determined under the order. The learned judicial commissioner decided that the issue on the date of delivery of vacant possession of the property was suitable to be determined under O 14A of the RHC, and proceeded to allow the plaintiff's O 14A application ('the order'). The defendant appealed. The issue was whether the date when vacant possession was to be given to the defendant (based on the relevant clauses of the agreement and joint acts of inspection and confirmation of parties) a question of fact, or was it a question of law or construction as envisaged under O 14A.

Held, by majority dismissing the defendant's appeal with costs:

(1) (per **Low Hop Bing JCA**) Order 14A r 1(1) enables the High Court to determine any question of law or construction of document where it appears to the court that such question is suitable for determination without the full trial of the action and such determination will finally determine the entire cause or matter or any claim or issue therein. Where the construction of document will finally determine an issue under O 14A and that issue is a dominant feature of a case, the High Court ought to proceed to so determine such issue. In this case the plaintiff's application came within the ambit of the 'construction of document' which is expressly provided in O 14A r 1(1) (see paras 40–42).

(2) (per **Low Hop Bing JCA**) The general rule under O 41 r 5(1) is that where the rights of the parties are to be finally determined in a particular application, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove. In the instant appeal, the plaintiff was actually relying on the written acknowledgment by the defendant's representative on 21 November 2005 that the school had

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been relocated. This was further confirmed by the letters dated 22 November 2005 and 29 November 2005 respectively issued by the defendant's solicitors. In fact, the plaintiff was not resorting to hearsay affidavits (see paras 58–59).

(3) (per **Low Hop Bing JCA**) Reading special conditions 1 and 3 together, vacant possession is deemed to be given upon the happening of two events viz: (1) the vendor (the plaintiff) informs the purchaser (the defendant) that vacant possession is ready to be delivered; and (2) upon inspection and confirmation by the purchaser (the defendant). Upon a true construction of special conditions 1 and 3 in the agreement and the correspondence between the parties' respective solicitors, vacant possession was ready to be delivered on 21 November 2005 and that the completion date was 21 March 2006, with an automatic extension of two months. The date on which vacant possession must be given is the completion of the sale and purchase which, according to item 10 of the schedule to the agreement and of special condition 1, is when the balance of the purchase price is paid, ie four months plus two months from the date when the plaintiff confirmed that they were ready to give vacant possession and after inspection and confirmation by the defendant. The plaintiff had stated that 'vacant possession is ready to be given' on 16 November 2005 and the inspection and confirmation by the defendant had been effected on 21 November 2005. The balance of the purchase price had to be paid within four plus two months from 21 November 2005, ie latest by 21 May 2006 as the extended completion date. However, the defendant had not done so (see paras 65, 72–75).

(4) (per **Zainun Ali JCA**) It would appear that the alleged 'disputes of fact' were contrived by the defendant, as an afterthought. In any case, the alleged 'disputes of fact' had been sufficiently addressed by the learned judicial commissioner in his judgment (see para 127).

(5) (per **Zainun Ali JCA**) Applications under O 14A is to decide clear points of law or construction apparent on the pleadings; see *Watson & Anor v Dutton Forshaw Motor Group Ltd v Ors* [1998] EWCA 3245 22 July 1998 (CA). In the instant appeal, the affidavits filed bear testimony to the unequivocal factual events. The court is competent to identify the material facts pleaded and conclude that they should not have been disputed at all or otherwise. In this connection where it appears to any party that a question of law or construction is apparent on the pleadings and determination by the court will finally dispose of the matter, this order can be invoked without the necessity of having to wait for the defence to be filed or waiting for the gamut of case management to take place and finalised. Waiting for these would defeat the very reason for the existence of the order. Apart from the requisite

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provisions in the order, as long as the statement of claim is clear, as are the affidavits in support, as regards the question of law or construction to be determined, which would finally dispose of the matter, the court's power for summary disposal under this order is assured. Thus, the defendant's proposition that a defence must first be filed before the court can hear an application under O 14A was misconceived (see paras 137–139, 145).

(6) (per **Zainun Ali JCA**) Clearly the point in time that the vendor could be said to be in a state of 'readiness' to deliver vacant possession occurred when the school had been relocated as required under cl 1. It does not, ipso facto, state that vacant possession must be physically delivered at that time. In other words, upon relocation of the school, the plaintiff is set and prepared and ready to deliver vacant possession. This is to be followed by inspection and confirmation by the defendant that the school had indeed been relocated. The point of time at which vacant possession must be delivered is contained in cl 6 of the agreement which means that vacant possession must be given upon completion of the sale and purchase (item 10 of the Schedule and cl 1 of the special conditions) ie when the balance of that purchase price is paid ie four months plus two months from the time the plaintiff confirmed that they were ready to give vacant possession and inspection had been held. Therefore according to the agreement, the vacant possession was to be given only on 21 May 2006, when the balance purchase price was to be paid. However, the defendant contended that vacant possession was only given on 28 February 2006 when the key to the fourth gate was given. Even if this was accepted, on the basis of this interpretation, the plaintiff had in actual fact given vacant possession long before the due date (see paras 160–164, 167).

(7) (per **Zainun Ali JCA**) Clearly the plaintiff's O 14A application was appropriate since the question of the construction of relevant clauses pertaining to vacant possession in the agreement was a central feature of the dispute between the parties (see para 175). As long as it is clear that the legal requirements are in place, the court should not be diffident in confronting the issues in an O 14A application. After considering this appeal in its entirety, the plaintiff's application under O 14A seeking the courts' determination on a point of construction of the relevant clauses in the agreement pertaining to the date of vacant possession was pertinent and in order (see paras 179–180).

(8) (per **Zulkefli JCA** dissenting) The plaintiff's O 14A application failed to satisfy the prerequisites of O 14A of the RHC. It was clear that based on the prayer (1) of the plaintiff's application it was for a determination on a question of fact. A factual question, such as that posed by the plaintiff should be determined in a full trial, and should not be

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determined summarily under the O 14A of the RHC procedure. It was also to be noted that there was no question of law framed or a specific question on the construction of the agreement forwarded by the plaintiff to the court for consideration. This was apparent in the plaintiff's O 14A application (see paras 4–5).

(9) (per **Zulkefli JCA** dissenting) Order 14A of the RHC is not a vehicle for which the court is required to interpret the statement of claim to decide what point of law arises before deciding on it. An application under O 14A of the RHC is to decide clear points of law or construction that are apparent on the pleadings. In this case the learned judicial commissioner proceeded to hear the plaintiff's O 14A application without the benefit of the defendant's defence which had yet to be filed at that time of the hearing of the application. Instead, the learned judicial commissioner thought it fit to choose to only confine himself to the averments made by the plaintiff in its statement of claim. The learned judicial commissioner had failed to sufficiently identify the relevant issues arising from the action, which necessarily ought to include the defendant's defence to the action. Therefore, the learned judicial commissioner was not in any position to make the order that he did, ie that the plaintiff's action against the defendant was suitable for determination under O 14A of the RHC (see para 6).

(10) (per **Zulkefli JCA** dissenting) For the court to exercise its power to summarily dispose of an action under O 14A of the RHC, there should not be any dispute by the parties as to the relevant facts, or that the court, upon scrutinising the pleadings, concludes that the material facts are not in dispute. In this case the affidavits filed by the defendant in opposing the plaintiff's O 14A application clearly showed that there was a serious dispute as to the material facts vis-a-vis the date of delivery of vacant possession of the school to the defendant (see para 7).

(11) (per **Zulkefli JCA** dissenting) Despite the entrenched principles of law that the court will not exercise its jurisdiction under O 14A of the RHC on the basis of facts which are strenuously being disputed, yet the learned judicial commissioner proceeded with the plaintiff's O 14A application by embarking on an expedition to evaluate conflicting affidavit evidence (see para 9).

(12) (per **Zulkefli JCA** dissenting) The defendant's contention that the plaintiff's application for the summary disposal of the suit under O 14A of the RHC was inappropriate and must fail was further strengthened by the fact that this court had already allowed the defendant's application to adduce and refer to the new and further evidence during the present appeal. Exhibits 'YTC-1', 'YTC-2', 'YTC-3', 'YTC-4' and

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'YTC-5' were the new documentary evidence the defendant sought to be considered in this appeal and were relevant to the issue raised in this appeal (see para 10).

[Bahasa Malaysia summary

Melalui satu perjanjian bertulis bertarikh 19 November 2004 ('perjanjian tersebut') yang dimasuki antara plaintif dan defendan, plaintif bersetuju untuk menjual kepada defendan sebidang tanah yang dipegang di bawah Geran 101840 Lot 325, Mukim Simpang Kanan, Daerah Batu Pahat, Johor ('tanah tersebut') pada harga RM33,500,000 ('harga belian'), dan defendan bersetuju untuk membelinya tertakluk kepada terma-terma dan syarat-syarat sepertimana yang dipersetujui oleh pihak-pihak. Salah satu daripada terma-terma dan syarat-syarat perjanjian memperuntukkan bahawa, plaintif hendaklah diberikan sembilan bulan dari tarikh perjanjian tersebut untuk menempatkan semula sekolah Cina yang dibina di atas tanah tersebut ('sekolah tersebut') bagi tujuan menyerahkan milikan kosong tanah tersebut kepada defendan. Ia juga suatu terma perjanjian tersebut bahawa, dari tarikh plaintif mengesahkan secara bertulis bahawa milikan kosong tanah tersebut sedia untuk diserahkan kepada defendan dan selepas pemeriksaan dan pengesahan oleh defendan, defendan mempunyai empat bulan dari tarikh tersebut untuk menyelesaikan baki harga belian kepada plaintif, dengan lanjutan automatik selama dua bulan dengan syarat bahawa defendan membayar faedah lewat kepada plaintif. Plaintif mendakwa bahawa milikan kosong sekolah tersebut, yang juga tanah tersebut, telah diserahkan kepada defendan pada 21 November 2005. Namun, defendan menghujahkan bahawa milikan kosong sekolah tersebut tidak diserahkan kepada defendan pada 21 November 2005, tetapi sebaliknya, pada 28 Februari 2006. Plaintif berikutan itu telah memfailkan satu tindakan terhadap defendan di mahkamah bawahan, dan dalam tindakannya, plaintif menuntut daripada defendan, antara lain: (1) satu deklarasi bahawa milikan kosong tanah tersebut telahpun diserahkan oleh plaintif kepada defendan pada 21 November 2005; dan (2) satu deklarasi bahawa defendan telah gagal untuk membayar kepada plaintif baki harga belian dan faedah untuk tempoh lanjutan pada atau sebelum 21 Mei 2006, dan oleh itu, deposit 10% harga belian yang dibayar oleh defendan dirampas oleh plaintif. Plaintif kemudiannya memfailkan satu permohonan di bawah A 14A Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') melalui saman dalam kamar bertarikh 12 September 2006 ('permohonan A 14A plaintif') untuk mahkamah menentukan tarikh penyerahan milikan kosong sekolah tersebut (iaitu tanah tersebut) kepada defendan. Defendan membangkang permohonan A 14A plaintif, antara lain, atas alasan bahawa terdapat pertikaian berhubung fakta-fakta penting yang jelas dalam afidavit-afidavit plaintif dan oleh itu tindakan tersebut tidak sesuai untuk ditentukan di bawah A 14A KMT.

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Adalah juga hujah defendan bahawa permohonan A 14A plaintif telah gagal untuk memuaskan pra syarat A 14A KMT agar tindakan tersebut ditentukan di bawah aturan tersebut. Pesuruhjaya kehakiman yang bijaksana telah memutuskan bahawa isu berhubung tarikh penyerahan milikan kosong tanah tersebut adalah sesuai untuk ditentukan di bawah A 14A KMT, dan seterusnya membenarkan permohonan A 14A plaintif ('perintah tersebut'). Defendan telah merayu. Isunya adalah sama ada tarikh apabila milikan kosong diserahkan kepada defendan (berdasarkan klausa-klausa relevan perjanjian tersebut dan tindakan bersama pemeriksaan dan pengesahan pihak-pihak) suatu persoalan fakta, atau adakah ia satu persoalan undang-undang atau pembentukan seperti yang dibayangkan di bawah A 14A.

Diputuskan, dengan majoriti menolak rayuan defendan dengan kos:

(1) (oleh **Low Hop Bing HMR**) Aturan 14A k 1(1) membolehkan Mahkamah Tinggi menentukan apa-apa persoalan undang-undang atau pembentukan dokumen di mana ia dilihat oleh mahkamah sebagai persoalan yang sesuai untuk penentuan tanpa perbicaraan penuh tindakan tersebut dan penentuan sedemikian akan akhirnya menentukan keseluruhan kausa atau perkara atau apa-apa tuntutan atau isu berkaitan. Di mana pembentukan dokumen akhirnya akan menentukan isu di bawah A 14A dan isu tersebut merupakan ciri dominan suatu kes, Mahkamah Tinggi hendaklah seterusnya menentukan isu sedemikan. Dalam kes ini permohonan plaintif termasuk dalam skop 'construction of document' yang jelas diperuntukkan dalam A 14A k 1(1) (lihat perenggan 40–42).

(2) (oleh **Low Hop Bing HMR**) Rukun am di bawah A 41 k 5(1) adalah di mana hak-hak pihak-pihak yang hendak ditentukan akhirnya dalam suatu permohonan tertentu, satu afidavit itu boleh mengandungi hanya fakta-fakta yang mana boleh dibuktikan oleh deponen setakat mana pengetahuannya yang ada. Dalam rayuan semasa, plaintif sebenarnya bergantung kepada pengesahan bertulis oleh wakil defendan pada 21 November 2005 bahawa sekolah tersebut telah ditempatkan semula. Ini telah disahkan seterusnya melalui surat-surat bertarikh 22 November 2005 dan 29 November 2005 masing-masing yang dikeluarkan oleh peguam defendan. Bahkan, plaintif tidak menggunakan afidavit-afidavit dengar cakap (lihat perenggan 58–59).

(3) (oleh **Low Hop Bing HMR**) Dengan membaca syarat khas 1 dan 3 bersama, milikan kosong dianggap telah diberikan berdasarkan dua kejadian iaitu: (1) penjual (plaintif) memberitahu pembeli (defendan) bahawa milikan kosong sedia untuk diserahkan; dan (2) setelah pemeriksaan dan pengesahan oleh pembeli (defendan). Berdasarkan

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pembentukan syarat sebenar 1 dan 3 dalam perjanjian tersebut dan perutusan antara peguam pihak-pihak masing-masingnya, milikan kosong telah sedia untuk diserahkan pada 21 November 2005 dan tarikh penyelesaiannya adalah pada 21 Mac 2006, dengan lanjutan automatik untuk dua bulan. Tarikh yang mana milikan kosong itu patut diberikan adalah selesainya jual beli tersebut yang mana, menurut item 10 kepada jadual perjanjian tersebut dan syarat khas 1, adalah apabila baki harga belian telah dibayar, iaitu empat bulan dan dua bulan daripada tarikh apabila plaintif mengesahkan bahawa ianya sedia untuk menyerahkan milikan kosong dan selepas pemeriksaan dan pengesahan defendan. Plaintif telah menyatakan bahawa 'vacant possession is ready to be given' pada 16 November 2005 dan pemeriksaan dan pengesahan oleh defendan telahpun dilaksanakan pada 21 November 2005. Baki harga belian telahpun dibayar dalam tempoh empat dan dua bulan tersebut daripada 21 November 2005, iaitu selewat-lewatnya 21 Mei 2006 sebagai tarikh penyelesaian yang dilanjutkan. Namun, defendan tidak berbuat sedemikian (lihat perenggan 65, 72–75).

(4) (oleh **Zainun Ali HMR**) Ia kelihatan seperti 'disputes of fact' yang dikatakan dibuat-buat oleh defendan, sebagai suatu yang telah difikirkan selepas itu. Walau bagaimanapun, 'disputes of fact' yang dikatakan itu telahpun dipertimbangkan dengan secukupnya oleh pesuruhjaya kehakiman dalam penghakimannya (lihat perenggan 127).

(5) (oleh **Zainun Ali HMR**) Permohonan-permohonan di bawah A 14A adalah untuk memutuskan dengan jelas poin-poin undang-undang atau pembentukan yang jelas dalam pliding tersebut; lihat *Watson & Anor v Dutton Forshaw Motor Group Ltd v Ors* (1998) EWCA 3245 22 July 1998 (HC). Dalam kes rayuan semasa, afidavit-afidavit yang difailkan merupakan bukti kepada kejadian-kejadian faktual yang tidak taksa itu. Mahkamah adalah kompeten untuk mengenalpasti fakta-fakta penting yang diplidkan dan memutuskan bahawa ia tidak patut dipertikaikan langsung atau sebaliknya. Dalam perkaitan ini di mana ia kelihatan kepada mana-mana pihak bahawa suatu persoalan undang-undang atau pembentukan adalah jelas dalam pliding dan keputusan oleh mahkamah akan menyelesaikan perkara tersebut, aturan ini boleh digunakan tanpa perlunya menunggu untuk pembelaan difailkan atau menunggu keseluruhan pengendalian kes berlaku dan selesai. Untuk menunggu yang berikut akan menjejaskan alasan untuk lanjutan aturan tersebut. Selain daripada peruntukan yang diperlukan dalam aturan tersebut, selagi penyataan tuntutan adalah jelas, seperti afidavit-afidavit sokongan berhubung persoalan undang-undang dan pembentukan yang perlu ditentukan, yang akhirnya menyelesaikan perkara tersebut, kuasa mahkamah untuk penyelesaian terus di bawah aturan ini meyakinkan. Oleh itu, saranan defendan bahawa satu pembelaan

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hendaklah terlebih dahulu difailkan sebelum mahkamah boleh mendengar satu permohonan di bawah A 14A telah disalah tanggap (lihat perenggan 137–139, 145).

(6) (oleh **Zainun Ali HMR**) Jelas masa sebenar di mana penjual boleh dikatakan berada dalam keadaan 'readiness' untuk menyerahkan milikan kosong berlaku apabila sekolah tersebut telah ditempatkan semula seperti yang dikehendaki di bawah kl 1. Ia tidak, ipso facto, menyatakan bahawa milikan kosong hendaklah secara fisikalnya diserahkan pada masa tersebut. Dalam kata lain, selepas penempatan semula sekolah tersebut, plaintif tetap pendirian dan bersedia untuk menyerahkan milikan kosong tersebut. Ini hendaklah diikuti dengan pemeriksaan dan pengesahan oleh defendan bahawa sekolah tersebut sememangnya telahpun ditempatkan semula. Masa sebenar di mana milikan kosong harus diserahkan terkandung dalam kl 6 perjanjian tersebut yang bermaksud bahawa milikan kosong hendaklah diberikan selepas selesai jual beli (item 10 kepada Jadual dan kl 1 kepada syarat-syarat khas) iaitu apabila baki harga belian telah dibayar iaitu empat bulan ditambah dua bulan dari masa plaintif mengesahkan bahawa mereka telah bersedia untuk memberikan milikan kosong dan pemeriksaan telah diadakan. Oleh itu menurut perjanjian tersebut, milikan kosong hendaklah diserahkan hanya pada 28 Februari 2006 apabila kunci kepada pintu keempat diberikan. Jikapun ini diterima, berdasarkan tafsiran ini, plaintif pada hakikatnya telahpun menyerahkan milikan kosong lebih awal dari tarikh luput (lihat perenggan 160–164, 167).

(7) (oleh **Zainun Ali HMR**) Adalah jelas permohonan A 14A plaintif sesuai memandangkan persoalan pembentukan klausa-klausa relevan berkaitan milikan kosong dalam perjanjian merupakan ciri utama pertikaian antara pihak-pihak (lihat perenggan 175). Selagi ianya jelas bahawa keperluan sah wujud, mahkamah tidak boleh kurang yakin dalam menghadapi isu-isu dalam satu permohonan A 14A. Setelah mempertimbangkan rayuan ini secara keseluruhannya, permohonan plaintif di bawah A 14A memohon keputusan mahkamah berhubung perkara pembentukan klausa-klausa relevan dalam perjanjian tersebut berkenaan tarikh milikan kosong adalah berkaitan dan teratur (lihat perenggan 179–180).

(8) (oleh **Zulkefli HMR menentang**) Permohonan A 14A plaintif gagal untuk memuaskan pra syarat A 14A KMT. Adalah jelas bahawa berdasarkan permohonan (1) kepada permohonan plaintif ianya tentang penentuan suatu persoalan undang-undang. Suatu persoalan faktual, seperti yang diutarakan oleh plaintif hendaklah ditentukan dalam perbicaraan penuh, dan tidak sepatutnya ditentukan secara terus di bawah prosedur A 14A KMT. Ia juga didapati bahawa tiada

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persoalan undang-undang dibentuk atau suatu persoalan khusus tentang pembentukan perjanjian tersebut dikemukakan oleh plaintif kepada mahkamah untuk pertimbangan. Ini jelas dalam permohonan A 14A plaintif (lihat perenggan 4–5).

(9) (oleh **Zulkefli HMR menentang**) Aturan 14A KMT bukan jentera di mana mahkamah dikehendaki mentafsirkan penyataan tuntutan untuk memutuskan apakah poin undang-undang yang timbul sebelum membuat keputusan tentangnya. Suatu permohonan di bawah A 14A KMT adalah untuk memutuskan poin-poin undang-undang yang jelas atau pembentukan yang nyata dalam pliding. Dalam kes ini pesuruhjaya kehakiman yang bijaksana terus mendengar permohonan A 14A plaintif tanpa memperoleh manfaat pembelaan defendan yang belum difailkan lagi pada masa perbicaraan permohonan tersebut. Sebaliknya, pesuruhjaya kehakiman yang bijaksana berpendapat ianya sesuai untuk memilih membatas dirinya kepada penegasan-penegasan yang dibuat oleh plaintif dalam penyataan tuntutannya, pesuruhjaya kehakiman yang bijaksana telah gagal untuk mengenalpasti secukupnya isu-isu relevan yang timbul daripada tindakan tersebut, yang perlu dimasukkan ke dalam pembelaan defendan dalam tindakan tersebut. Oleh itu, pesuruhjaya kehakiman yang bijaksana tidak berada dalam apa-apa kedudukan untuk membuat perintah yang telah dibuatnya, iaitu bahawa tindakan plaintif terhadap defendan adalah sesuai untuk ditentukan di bawah A 14A KMT (lihat perenggan 6).

(10) (oleh **Zulkefli HMR menentang**) Untuk mahkamah menggunakan kuasanya untuk terus menyelesaikan suatu tindakan di bawah A 14A KMT, tidak sepatutnya ada apa-apa pertikaian oleh pihak-pihak berhubung fakta-fakta berkaitan, atau di mana mahkamah, setelah meneliti pliding, memutuskan bahawa fakta-fakta penting tidak dipertikaikan. Dalam kes ini afidavit-afidavit yang difailkan oleh defendan dalam membangkang permohonan A 14A plaintif jelas menunjukkan bahawa terdapat suatu pertikaian yang serius berhubung fakta-fakta penting tersebut iaitu tarikh penyerahan milikan kosong sekolah tersebut kepada defendan (lihat perenggan 7).

(11) (oleh **Zulkefli HMR menentang**) Walaupun terdapat prinsip-prinsip undang-undang yang kukuh bahawa mahkamah tidak akan menggunakan bidang kuasanya di bawah A 14A KMT berdasarkan fakta-fakta yang sedang dipertikaikan, pesuruhjaya kehakiman yang bijaksana masih meneruskan dengan permohonan A 14A plaintif dengan memulakan penilaian ke atas keterangan afidavit yang bercanggah (lihat perenggan 9).

(12) (oleh **Zulkefli HMR menentang**) Hujah defendan bahawa permohonan plaintif untuk penyelesaian terus guaman itu di bawah A 14A KMT tidak sesuai dan harus gagal telah diperkukuhkan lagi oleh

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fakta bahawa mahkamah ini telahpun membenarkan permohonan defendan untuk mengemukakan dan merujuk kepada keterangan baru dan selanjutnya dalam rayuan semasa. Ekshibit-ekshibit 'YTC-1', 'YTC-2', 'YTC-3', 'YTC-4' dan 'YTC-5' merupakan keterangan dokumentari baru yang mana defendan pohon agar dipertimbangkan dalam rayuan ini dan adalah relevan kepada isu yang ditimbulkan dalam rayuan ini. (lihat perenggan 10).]

Notes

For a case on construction of contract, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) para 7155.

For cases on determination of question of law or construction of document, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 7239–7241.

Cases referred to

Dato' Ng Tian Seng v Toh Pee Yok & Ors [2004] 5 CLJ 153 (refd)
Eng Mee Yong & Ors v Letchumanan [1979] 2 MLJ 212 (refd)
Esso Standard Malaysia Berhad v Southern Cross Airways (Malaysia) Bhd [1972] 2 MLJ 168 (refd)
European Asian Bank AG v Punjab and Sind Bank (No 2) [1983] 2 All ER 508 (refd)
Federal Insurance Co v Nakano Singapore (Pte) Ltd [1992] 1 SLR 390 (refd)
Hock Hua Bank v Yong Liuk Thin [1995] 2 MLJ 213 (refd)
Hue Chooi Yin v Chew Pit King [2006] 4 MLJ 791 (refd)
Korso Finance Establishment Anstalt v John Wedge , unreported, English Court of Appeal Transcript No 14/387, 15 February 1994 (refd)
Ladd v Marshall [1954] 3 All ER 745; [1954] 1 WLR 1489 (refd)
Lekaz Constructions Sdn Bhd v KOP Petroleum Sdn Bhd [2003] 4 CLJ 377 (refd)
Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719 (refd)
Mohamed v Alaga & Co [1998] 2 All ER 720 (refd)
Morello Sdn Bhd v Jacques (International) Sdn Bhd [1995] 1 MLJ 577 (refd)
MP-Bilt Pte Ltd v Oey Widarto [1999] 3 SLR 592 (refd)
Muhamad Zain bin Sidek v Suruhanjaya Perkhidmatan Awam Malaysia [2002] MLJU 779 (refd)
Petroleum Nasional Bhd v Kerajaan Negeri Terengganu [2004] 1 MLJ 8 (refd)
Seruan Gemilang Makmur Sdn Bhd v Badan Perhubungan UMNO Negeri Pahang Darul Makmur [2004] 1 LNS 55 (refd)
State Bank of India v Murjani Marketing Group Ltd & Ors EWCA 27 March 1991 (refd)
Tokyo Investment Pte Ltd & Anor v Tan Chor Thing [1993] 3 SLR 170 (refd)
Vohrah-Merican Sdn Bhd v Gombak Land Sdn Bhd [2006] 3 AMR 263 (refd)
Watson & Anor v Dutton Forshaw Motor Group Ltd & Ors EWCA, 22 July 1998 (refd)

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A *Wiedemann v Walpole* [1891] 2 QB 534 (refd)

Legislation referred to

Companies Act 1965 s 181
Courts of Judicature Act 1964 ss 69(1), 69(3)
B Rules of the Court of Appeal 1994 r 7(3A)
Rules of the Court [Sing] O 14 r 12, O 33 r 2
Rules of the High Court 1980 O 14A, O 14A r 1(1), O 33 r 2, O 41 r 5(1)
Rules of the Supreme Court [UK] O 14A,, O 14A r 1, O 14A r 1(1)

C

Appeal from: Civil Suit No MT2–22–645 of 2006 (High Court, Johor Bahru)

N Segaram (CH Mong with him) (Shearn Delamore & Co) for the appellant.
D *DP Vijandren (Robert Devan, Analiza Kassim and Komathi with him) (Robert Devan & Co) for the respondent.*

Zulkefli JCA (now FCJ):

E INTRODUCTION

[1] This is an appeal by the defendant against the decision of the learned judicial commissioner of the High Court at Johor Bahru allowing the
F plaintiff's application for summary disposal of the suit filed by the plaintiff against the defendant on a point of law under O 14A of the Rules of the High Court 1980 ('the RHC') and entering summary judgment in favour of the plaintiff.

G

[2] At the appeal stage before the Court of Appeal the defendant filed a notice of motion in encl (24a) pursuant to r 7 of the Rules of the Court of Appeal 1994 and s 69 of the Courts of Judicature Act 1964 for an order that the defendant be at liberty, upon the hearing of the present appeal to adduce
H and refer to the fresh and further evidence as exhibited in exhs 'YTC1', 'YTC2', 'YTC3', 'YTC4' and 'YTC5' to the affidavit of Yiap Toon Cheng affirmed on 16 August 2007. Having heard the arguments of learned counsel for the defendant and the plaintiff we unanimously allowed the defendant's application in encl (24a) and made an order in terms of the application.
I We find that the defendant has satisfied the necessary conditions as set out in r 7(3A) of the Rules of the Court of Appeal 1994 and s 69(3) of the Courts of Judicature Act 1964. We also find the defendant has justified the reception of the fresh evidence under the principles as set out in the case of *Ladd v Marshall* [1954] 3 All ER 745.

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BACKGROUND FACTS OF THE CASE

[3] The relevant background facts of the case are as follows:

(1) By a written agreement dated 19 November 2004 ('the agreement') entered between the plaintiff and the defendant, the plaintiff agreed to sell to the defendant a piece of land held under Geran 101840 Lot 325, Mukim Simpang Kanan, District of Baru Pahat, Johor ('the said property') for RM33,500,000 ('purchase price'), and the defendant agreed to purchase the same subject to the terms and conditions as agreed by the parties.

(2) One of the terms and conditions of the agreement provides that, the plaintiff shall be given nine months from the date of the said agreement to relocate a Chinese school built on the said property, namely, SJK (C) Hwa Nan ('the said school') in order to hand over vacant possession of the said property to the defendant.

(3) It is also a term of the agreement that, from the date the plaintiff confirms in writing that vacant possession of the said property is ready to be delivered to the defendant and upon inspection and confirmation by the defendant, the defendant shall have four months from the said date to settle the balance purchase price to the plaintiff, with an automatic extension of two months on condition that the defendant shall pay late interest to the plaintiff.

(4) It is claimed by the plaintiff that vacant possession of the said school, hence the said property, was delivered to the defendant on 21 November 2005. However, the defendant is contending that vacant possession of the said school was not delivered to the defendant on 21 November 2005, but instead, it was on 28 February 2006.

(5) The plaintiff proceeded to file an action against the defendant in the court below, and in its action, the plaintiff claims against the defendant, inter alia:

(a) a declaration that vacant possession of the said property has been delivered by the plaintiff to the defendant on 21 November 2005; and

(b) declaration the defendant has failed to pay to the plaintiff the balance purchase price and the interest for extended period on or before 21 May 2006, and therefore, the deposit of 10% of the purchase price paid by the defendant is forfeited by the plaintiff.

(6) The plaintiff thereafter filed an application under O 14A of the RHC vide summons in chambers dated 12 September 2006 ('plaintiff's

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O 14A application') for the court to determine the date of delivery of vacant possession of the said school (hence, the said property) to the defendant.

(7) The defendant opposed the plaintiff's O 14A application, inter alia, on the ground that there is a dispute as to the material facts which is evident in the parties' affidavits and therefore the action is not suitable to be determined under O 14A of the RHC. It is also the defendant's contention that the plaintiff's O 14A application has failed to satisfy the prerequisites of O 14A of the RHC for the action to be determined under the said order.

(8) On 10 October 2006, the learned judicial commissioner decided that the issue on the date of delivery of vacant possession of the said property is suitable to be determined under O 14A of the RHC, and proceeded to allow the plaintiff's O 14A application ('order'). This is the defendant's appeal against the said order.

DECISION ON APPEAL

[4] It is my judgment that the plaintiff's O 14A application (encl (8)) fails to satisfy the prerequisites of O 14A of the RHC. The plaintiff's application in encl (8) as I see it is seeking determination of a question of fact and not law. Order 14A of the RHC provides that the court may upon the application of a party determine any question of law or construction of any document arising in any cause or matter where it appears to the court that such question is suitable for determination without the full trial of the action and such determination will finally determine the cause or matter. The plaintiff's O 14A application essentially seeks the High Court determination of a question based on prayer (1) as follows:

> (1) Menurut A 14A Kaedah-Kaedah Mahkamah Tinggi 1980, kandungan perjanjian jualbeli bertarikh 19 November 2004 dibuat di antara plaintif dan defendan ditafsirkan, terutamanya kl 12 perjanjian tersebut dan syarat-syarat khas No 1 dan No 3 dalam perjanjian tersebut untuk memutuskan tarikh plaintif menyerahkan milikan kosong tanah yang dikenali sebagai Geran No 101840 Lot No 325, Mukim Simpang Kanan, Daerah Batu Pahat kepada defendan ...

English Translation:

> (1) Pursuant to O 14A Rules of the RHC, the contents of the sale and purchase agreement dated 19 November 2004 made between the plaintiff and the defendant be construed, in particular cl 12 of the agreement and special conditions No 1 and No 3 of the agreement to determine the date the plaintiff delivered vacant possession of the land known as Geran No 101840, Lot No 325, Mukim of Simpang Kanan, to the defendant ...

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[5] It is clear that based on the said prayer (1) it is for a determination on a question of fact. A factual question, such as that posed by the plaintiff above should be determined in a full trial, and should not be determined summarily under the O 14A of the RHC procedure. It is also to be noted that there is no question of law framed or a specific question on the construction of the agreement forwarded by this plaintiff to the court for consideration. This is apparent in the plaintiff's O 14A application. On the need to have proper question of law or a specific question on the construction of document framed, I would like to refer to the case of *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu* [2004] 1 MLJ 8 wherein the court therein, inter alia, had this to say (at p 19):

> The primary issue in the suit was whether the plaintiff had, at any time, sovereign rights over petroleum in the continental shelf adjacent to the coast of Terengganu. This primary issue was contained in the first three questions posed in the defendant's application. All the questions were purely questions of law.

On this ground alone wherein there is no question of law or a specific question on the construction of the document framed, the said application by the plaintiff ought to have been dismissed by the learned judicial commissioner.

[6] I am also of the view that O 14A of the RHC is not a vehicle for which the court is required to interpret the statement of claim to decide what point of law arises before deciding on it. An application under O 14A of the RHC is to decide clear points of law or construction that are apparent on the pleadings. It is to be noted in this case the learned judicial commissioner proceeded to hear the plaintiff's O 14A application without the benefit of the defendant's defence which had yet to be filed at that time of the hearing of the application. Instead, the learned judicial commissioner thought it fit to choose to only confine himself to the averments made by the plaintiff in its statement of claim. The learned judicial commissioner has failed to sufficiently identify the relevant issues arising from the action, which necessarily ought to include the defendant's defence to the action. Therefore, the learned judicial commissioner was not in any position to make the said order that he did, ie, that the plaintiff's action against the defendant was suitable for determination under O 14A of the RHC. On this point I would like to refer to the case of *Watson & Anor v Dutton Forshaw Motor Group Ltd & Ors* EWCA, 22 July1998 wherein the Court of Appeal therein stated, inter alia, as follows:

> With the benefit of hindsight it is possible to see that this is where things began to go wrong. In fact the particulars would not be relevant to the O 14A application either so far as the plaintiffs were concerned or so far as the defendants were concerned. The issue of law, if it was discernible at all, had to be discernible from the statement of claim and the defence. The judge himself ruled at the outset of

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the hearing of the O 14A application on 17 October 1994 that he should not adjourn that hearing as he was requested to do by the plaintiffs' counsel on the basis that particulars were about to be delivered 'since it is not the function of particulars to take the place of necessary averments in the pleading'.

[7] It is trite law that, for the court to exercise its power to summarily dispose off an action under O 14A of the RHC, there should not be any dispute by the parties as to the relevant facts, or that the court, upon scrutinising the pleadings, concludes that the material facts are not in dispute (see the case of *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu*). In this case it is noted that from the affidavits filed by the defendant in opposing the plaintiff's O 14A application, it is clearly shown that there is a serious dispute as to the material facts vis-a-vis the date of delivery of vacant possession of the said school to the defendant. The said school was still not relocated in November 2005 contrary to the plaintiff's claim. Yiap Toon Cheng from the defendant company who was asked by the plaintiff's representatives to inspect the said school, did not confirm on 21 November 2005 that vacant possession of the said school was given on the said date. The said school administration did not allow the defendant unrestricted access to the said school after the visit on 21 November 2005 contrary to the plaintiff's claim. It was only on 28 February 2006 that the defendant was given the keys to the said school by the plaintiff (see pp 137–140 Part B of the appeal record).

[8] It is also noted that the defendant's conveyancing solicitors, namely, Messrs Ajmer Sandhu & Ong, did write and did refute the plaintiff's solicitors' suggestion that vacant possession of the said property had been delivered on 21 November 2005 (see pp 276–280 Part C of appeal record).

[9] It is to be noted in this case despite the entrenched principles of law that the court will not exercise its jurisdiction under O 14A of the RHC on the basis of facts which are strenuously being disputed, yet, the learned judicial commissioner proceeded with the plaintiff's O 14A application by embarking on an expedition to evaluate conflicting affidavit evidence. This is evident in the learned judicial commissioner's grounds of judgment wherein amongst others he had stated as follows:

(i) ... A few photographs of the new school and those present at the Opening Ceremony of the new school premises for Sekolah Hwa Nan were published in the article which reported, inter alia, that the Member of Parliament of Seri Gading Datuk Mohd Aziz announced a donation of RM30,000 for the school development funds. The photographs exhibited in the plaintiff's manager Tang Pei Hau's

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affidavit were confirmed as those taken by him personally on 18 November 2005. Those photographs showed the process of moving of the school ...

(See p 98 Part B of appeal record).

(ii) ... In Yiap's OS Affidavit, he had named three persons as being the 'school administration' who prevented the defendant from entering the school and who allegedly had a meeting with him on 17 February 2006 and 22 February 2006. A few letters were also exhibited in Dato' Tan's affidavit to show that two of those three persons denied preventing the defendant from entering the school. The third person named by Yiap Toon Cheng was one 'Tan Yu Keng'. However, Tan Yu Keng in his letter stated very clearly that he did not even meet Yiap Toon Cheng on 17 February 2006 or 22 February 2006 ...

(See p 100 Part B of the appeal record).

(iii) ... Looking at all the evidence submitted by both parties, I am sure if the headmaster and the school teachers of the School are called as witnesses in court, they will all confirm that the School had moved to their new premises in November 2005, and the parents of the students will also confirm that they started attending classes at their new school premises in January 2006. I also have no doubt that if YB Datuk Mohd Aziz (the Member of Parliament of Sri Gading) is asked in court as a witness, he will also confirm that he attended the Opening Ceremony of the new school premises for Sekolah Hwa Nan ...

(See pp 102–103 Part B of the appeal record).

[10] I am of the considered view the defendant's contention that the plaintiff's application for the summary disposal of the suit under O 14A of the RHC is inappropriate and must fail is further strengthened by the fact that this court had already allowed the defendant's application to adduce and refer to the new and further evidence during the present appeal under the defendant's notice of motion in encl (24a). Exhibits 'YTC1', 'YTC2', 'YTC3', 'YTC4' and 'YTC5' are the new documentary evidence the defendant seeks to be considered in this appeal and are relevant to the issue raised in this appeal.

[11] The plaintiff is adamant with its position that the said school has been vacated and that it has delivered vacant possession of the said property on 21 November 2005. Contrary to the plaintiff's claim, the defendant has stated that it did not obtain vacant possession of the said property on 21 November 2005 as the defendant still did not obtain vacant possession of the said school premises which is part of the said property. The defendant has also stated that the said school administration of SJK (C) Hwa Nan

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repeatedly disallowed the defendant from entering the said school premises after 21 November 2005. The defendant was being denied access to the said school premises from time to time by the said school administration until February 2006 when the plaintiff handed over the keys to the said school premises to the defendant on 28 February 2006.

[12] It is also pertinent to note that the learned judicial commissioner had reached the decision that the date of delivery of vacant possession of the said property must be on 21 November 2005 since he had found that the said school had been relocated before the date of joint inspection on 21 November 2005, and he therefore proceeded to allow the plaintiff's O 14A application (see paras 13–16 of the grounds of judgment at p 98 Part B of appeal record). However, exhs 'YTC1', 'YTC2', 'YTC3', 'YTC4' and 'YTC5' produced at this appeal stage clearly show that the said school had not been relocated on 21 November 2005, contrary to the claim made by the plaintiff as in its affidavits in support of the said O 14A application. Exhibits 'YTC1', 'YTC2', 'YTC3', 'YTC4' and 'YTC5' are all documents emanating from the said school administration which clearly and distinctly support the defendant's position and contention in the court below that the defendant did not obtain vacant possession of the said property on 21 November 2005.

CONCLUSION

[13] For the reasons above stated, I am of the view that the learned judicial commissioner had arrived at a wrong decision in the O 14A application of the plaintiff. I would allow the defendant's appeal with costs and set aside all the orders made by the High Court. Deposit paid by the defendant for this appeal is to be refunded to the defendant.

Low Hop Bing JCA:

APPEAL

[14] Pursuant to the plaintiff's application in encl (18) filed under O 14A of the Rules of the High Court 1980 ('O 14A') in Johor Bahru High Court on 10 October 2006, the learned judicial commissioner made the following orders:

(a) a declaration that vacant possession of the land held under Geran No 101840, Lot No 325 in the mukim of Simpang Kanan, district of Batu Pahat ('the land') had been delivered by the plaintiff to the defendant on 21 November 2005;

(b) a declaration that the defendant had failed to pay to the plaintiff the

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balance of the purchase price and interest for extension of time on or before 21 May 2006, and so the 10% deposit paid by the defendant shall be forfeited to the plaintiff;

(c) the defendant to redeliver vacant possession of the land to the plaintiff;

(d) damages to be assessed, with interest thereon at 8% per annum from the date of the writ to the date of realisation;

(e) the plaintiff to retain, as security for damages, the sum of RM5,150,000 paid on 24 August 2006 through the defendant's solicitors to the plaintiff's solicitors; and

(f) costs.

[15] On 19 October 2006, the defendant appealed to this court against the whole of the above decision.

[16] The parties herein are referred to in the same capacities as in the High Court.

NOTICE OF MOTION

[17] At the hearing of the instant appeal on 29 August 2007, this court unanimously made an order in terms, allowing the defendant's notice of motion in encl (24a) to adduce further evidence, as the defendant has fulfilled the requirements set out in r 7(3A) of the Rules of the Court of Appeal 1994; s 69(3) of the Courts of Judicature Act 1964; and the principles enunciated in *Ladd v Marshall* [1954] 1 WLR 1489.

FACTUAL BACKGROUND

[18] Vide sale and purchase agreement executed between the plaintiff and the defendant on 19 November 2004 ('the SPA'), in consideration of RM33,500,000 ('the purchase price'), the plaintiff agreed to sell and the defendant agreed to buy the land covering an area of 5.8274 hectares or 14.4 acres, with 40 squatters and a school known as Sekolah Rendah Hwa Nan ('the school') thereon.

[19] Special condition 1 of the SPA provides as follows:

> The parties hereto are aware that currently there are forty (40) squatters and a Chinese school on the said Property. The Vendor shall be given six (6) months from the date of the Sale and Purchase Agreement to clear the said squatters and nine (9) months to relocate the said School in order to hand over vacant possession of the said Property to the Purchaser. Within six (6) months from the date of this

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Agreement, the Vendor shall evict the forty (40) squatters and upon confirmation by the Purchaser of the aforesaid, the Purchaser shall pay to the Vendor a further sum equivalent to 2.5% of the Purchase Price. If the Vendor is unable to evict the said squatters within the said 6 months period, the Vendor shall not be entitled to the said sum early and the balance purchase price shall therefore be payable within the time stated in Section 10 of the Schedule hereto. The parties hereby expressly agree that the Vendor shall be given an automatic extension of three (3) months from the expiry of the time stipulated hereinabove (hereinafter referred to as "the Automatic Extension Period") to clear the squatters and relocate the school in the event the Vendor fails to complete the abovesaid within the time stipulated hereinabove. Thereafter, the Purchaser shall have the option to extend the completion date in the event the Vendor fails to evict the squatters and relocate the school after the Automatic Extension Period

[20] The school occupied about 0.75 acre ie about 5% of the land. There were four gates to the school. The key to the fourth gate was given by the plaintiff to the defendant on 28 February 2006.

[21] Special condition 3 of the SPA reads:

3. *From the date that the Vendor confirms in writing that vacant possession is ready to be delivered to the Purchaser pursuant to Clause 1 above and upon inspection and confirmation by the Purchaser*, the Purchaser shall be given four (4) months from the date thereof to settle the balance of the Purchase Price to the Vendor, with an automatic extension of two (2) months commencing from the expiry of the aforesaid four (4) months provided that the Purchaser shall pay interest on the balance of the Purchase Price still unpaid at the rate of seven per centum (7%) per annum calculated from the commencement of the extended period until the full settlement of the balance Purchase Price. (Emphasis added.)

[22] On 16 November 2005, the plaintiff's solicitors Messrs Gan & Tey wrote to the defendant's solicitors Messrs Ajmer Sandhu & Ong to propose a joint inspection of the land on 18 November 2005 in order to hand over vacant possession to the defendant.

[23] Vide letter dated 17 November 2005, the defendant's solicitors confirmed that the parties have agreed to a joint inspection of the land on 21 November 2005 at 2pm.

[24] On 21 November 2005, the parties through their representatives carried out the joint inspection.

[25] After the joint inspection, while the representatives were still at the school, the defendant's representative one Yiap Toon Cheng penned these words: 'I have jointly inspected the school site with Mr Edwin Tan &

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Mr Tang and confirm that the school administration has been relocated' ('the relocation confirmation'). Below these words were, inter alia, the signature and the name 'YIAP TOON CHENG'.

[26] On 22 November 2005, the plaintiff's solicitors wrote to the defendant's solicitors, confirming that the completion date of the SPA was 21 March 2006, with an extension of two months subject to payment of interest at 7% per annum.

[27] The defendant's solicitors vide letter dated 29 November 2005 to the plaintiff's solicitors reiterated, inter alia, that the defendant was agreeable to the confirmation contained in the above letter of the plaintiff's solicitors.

[28] The plaintiff's solicitors vide letter dated 21 December 2005 to the defendant's solicitors repeated the above completion date ie 21 March 2006.

[29] The defendant's solicitors vide letter dated 9 January 2006 to the plaintiff's solicitors reaffirmed that the defendant was agreeable to the contents of the letters dated 22 November 2005 and 21 December 2005.

[30] Between 22 November 2005 and 7 March 2006, the defendant's solicitors did not dispute that vacant possession had been delivered to the defendant on 21 November 2005.

[31] However, the defendant's solicitors vide letter dated 8 March 2006 to the plaintiff's solicitors alleged that the defendant had all the while been prevented by the school from entering the premises and that vacant possession was only delivered to the defendant on 28 February 2006.

[32] Consequently, vide summons in chambers, encl (8), filed in the High Court under O 14A, the plaintiff sought a construction of clause 12 and special conditions 1 and 3 of the SPA and a determination of the date of delivery of vacant possession of the land as well as the date on which payment of the balance ie 90% of the purchase price was due and payable under the SPA.

[33] Other relevant facts will be referred later in this judgment as and when necessary.

APPLICABILITY OF O 14A

[34] The defendant's learned counsel Mr N Segaram submitted that the plaintiff's application is seeking a determination of a question of fact and not

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law, and so it should be determined at the full trial of this action and not summarily under O 14A. Support was sought in:

(1) *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu* [2004] 1 MLJ 8 (CA); and

(2) *Lekaz Constructions Sdn Bhd v KOP Petroleum Sdn Bhd* [2003] 4 CLJ 377 (HC).

[35] It was argued by Mr DP Vijandran learned counsel for the plaintiff that the plaintiff's application concerns a construction of the SPA and other relevant documents, in relation to the following issues:

(1) the date on which vacant possession of the land was to be given; and

(2) whether the joint inspection on 21 November 2005 together with the relevant correspondence constituted delivery of vacant possession under the terms of the SPA.

[36] In order to resolve the above opposing submissions, it is necessary for me to refer to prayer (1) in the plaintiff's application which reads as follows:

(1) Menurut A 14A Kaedah-Kaedah Mahkamah Tinggi 1980, kandungan perjanjian Jualbeli bertarikh 19 November 2004 yang dibuat antara plaintif dan defendan ditafsirkan, terutamanya kl 12 perjanjian tersebut dan syarat-syarat khas No 1 dan No 3 dalam perjanjian tersebut untuk memutuskan tarikh plaintif menyerahkan milikan kosong tanah yang dikenali sebagai Geran No 101840 Lot No 325 Mukim Simpang Kanan, Daerah Batu Pahat kepada defendan.

[37] [My Translation

(1) Pursuant to O 14A of the Rules of the High Court 1980, the contents of the sale and purchase agreement dated 19 November 2004 made between the plaintiff and the defendant be construed, in particular cl 12 of the agreement and special conditions No 1 and No 3 of the agreement to determine the date the plaintiff delivered vacant possession of the land known as Geran No 101840, Lot No 325, Mukim of Simpang Kanan, to the defendant.

[38] Upon a reasonable reading of the aforesaid prayer, I entertain no doubt that the plaintiff is seeking a construction of document ie the SPA, in particular cl 12 and special conditions 1 and 3 thereof.

[39] Construction of document has been expressly stated in O 14A r 1(1) which reads:

Determination of question of law or construction (O 14A r 1)

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(1) The Court may upon the application of a party or of its own motion determine any question of law or *construction of any document* arising in any cause or matter at any stage of the proceedings where it appears to the Court that —

(a) such question is suitable for determination without the full trial of the action; and

(b) such determination will finally determine the entire cause or matter or any claim or issue therein. (Emphasis added.)

[40] Our O 14A r 1(1) is adopted substantially from O 14A r 1(1) of the (UK) Rules of the Supreme Court, with the exclusion of the words contained in bracket in O 14A r 1(1)(b) viz '(subject to any possible appeal)'. Order 14A r 1(1) enables our High Court to determine any question of law or *construction of document* where it appears to the court that such question is suitable for determination without the full trial of the action and such determination will finally determine the entire cause or matter or any claim or issue therein (see *Petroleum Nasional Bhd*, at p 19A–B, per Mohd Noor Ahmad JCA (later FCJ)).

[41] Where the construction of document will finally determine an issue under O 14A and that issue is a dominant feature of a case, the High Court ought to proceed to so determine such issue: see *Korso Finance Establishment Anstalt v John Wedge* , unreported, the English Court of Appeal Transcript No 14/387 dated 15 February 1994, which was followed in *Petroleum Nasional Bhd* (see also *Lekaz Constructions Sdn Bhd* (HC), at p 379e–g per James Foong J (now JCA); and *Vohrah-Merican Sdn Bhd v Gombak Land Sdn Bhd* [2006] 3 AMR 263 (HC) at p 269).

[42] In the light of the above analysis, I am of the view that the plaintiff's application comes within the ambit of the 'construction of document' which is expressly provided in O 14A r 1(1). Hence, the submission presented for the defendant is not sustainable.

[43] I shall now consider the second contention raised for the defendant.

QUESTION OF LAW

[44] The defendant argued that no question of law is discernible from the pleadings and so it was not suitable for determination under O 14A. For this proposition, reference was made to:

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(1) *Watson & Anor v Dutton Forshaw Motor Group Ltd & Ors* EWCA, 22 July 1998 (CA); and

(2) *Petroleum Nasional Bhd*.

[45] The plaintiff's response is that the plaintiff was not invoking the 'question of law' provisions under O 14A, but has actually relied on the alternative limb pertaining to 'construction of document'.

[46] In *Watson & Anor* cited for the defendant, the English Court of Appeal held, inter alia, that O 14A is to be applied for deciding clear points of law or construction apparent on the pleadings. O 14A is not narrowly confined to question of law only, but is also applicable to construction of document which has been raised in the instant appeal. The judgment of the English Court of Appeal is clearly supportive of the plaintiff's contention based on construction of document.

[47] Pursuant to an application under O 14A and O 33 r 2, three questions of law posed for determination in *Petroleum Nasional Bhd*, were dismissed by the High Court, but the appeal therefrom was allowed by the Court of Appeal. While it is true that no issue has been ventilated in relation to 'construction of document' under the alternative limb of O 14A, I am unable to find anything in the judgment of our Court of Appeal that militates against the plaintiff's invocation of the alternative limb pertaining to 'construction of document'.

[48] With the utmost respect, I am unable to find any merit in the defendant's submission herein.

MATERIAL FACTS

[49] The defendant next took the stand that a scrutiny of the pleadings reveals that material facts are disputed and so O 14A is inapplicable, relying on:

(1) *Petroleum Nasional Bhd*;

(2) *Seruan Gemilang Makmur Sdn Bhd v Badan Perhubungan UMNO Negeri Pahang Darul Makmur* [2004] 1 LNS 55 (HC);

(3) *Dato' Ng Tian Seng v Toh Pee Yok & Ors* [2004] 5 CLJ 153 (HC);

(4) *Federal Insurance Co v Nakano Singapore (Pte) Ltd* [1992] 1 SLR 390 (CA Singapore); and

(5) *State Bank of India v Murjani Marketing Group Ltd & Ors* EWCA 27 March 1991 (CA).

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[50] The plaintiff disagreed. *Petroleum Nasional* has been considered above. I shall not risk any repetition.

[51] In *Seruan Gemilang*, three questions of law in relation to 'a purported agreement' were raised pursuant to an application under O 14A. Heliliah J (now JCA) held that they were unsuitable for determination under O 14A.

[52] In addition, defendant's reliance on the 'purported agreement' in *Seruan Gemilang*, is alien to the instant appeal which revolves around a properly executed agreement, wherein the terms and conditions are eminently suitable for determination by way of construction.

[53] In *Dato' Ng Tian Seng*, the respondents alleged, inter alia, that the petitioner under s 181 of the Companies Act 1965 had no locus standi and that the petition was filed for a collateral purpose. The petitioner invoked O 14A r 1(1) in order to strike out and/or dismiss the petition. Syed Ahmad Helmy JC (now J) held, inter alia, that as the facts pertaining to the allegations of collateral purposes have been disputed by the petitioner, it does not fall within the ambit of O 14A.

[54] In the Singapore case of *Federal Insurance Co*, the appellants took out a notice under O 33 r 2 for an order to try the preliminary issue of whether the appellants' claim was in fact time-barred. The appellant's application was dismissed first by the registrar, then the judge in chambers and finally the Court of Appeal on the ground that there are disputed factual matters. Order 14A was never raised at any of the three stages of the proceedings.

[55] In *State Bank of India*, the English Court of Appeal was concerned with an O 14 application and not O 14A. The facts therein were a little complex and involve proceedings in three different jurisdictions and so the Court of Appeal held, inter alia, that it was an inappropriate exercise under O 14. Hence, the defendant's appeal against summary judgment was allowed. The plaintiff's reliance on O 14A r 1 was also rejected there.

[56] It is plain to me that none of the above authorities is capable of rendering any support to the defendant in the instant appeal.

AFFIDAVITS

[57] It was the defendant's contention that as the plaintiff's O 14A application would finally determine the rights of the parties, affidavits based on hearsay evidence are not admissible; in particular, the affidavits affirmed by one Dato Tan Eng Boon and one Tang Pei Hau who are not in a position

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to personally verify the facts pertaining to the relocation of the school. The defendant referred to:

(1) O 41 r 5;

(2) *Hue Chooi Yin v Chew Pit King* [2006] 4 MLJ 791 (HC); and

(3) Singapore Court Practice 1999.

[58] The plaintiff contended that support was garnered from the defendant's own documents, and not from hearsay evidence. In my judgment, the general rule under O 41 r 5(1) is that where the rights of the parties are to be finally determined in a particular application, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove. See eg *Hue Chooi Yin*, and Singapore Court Practice 1999 p 540 para 14/13/4.

[59] In the instant appeal, the plaintiff is actually relying on the written acknowledgment by the defendant's representative on 21 November 2005 that the school had been relocated. This was further confirmed by the letters dated 22 November 2005 and 29 November 2005 respectively issued by the defendant's solicitors. In fact, the plaintiff was not resorting to hearsay affidavits.

NON-PLEADED ISSUE

[60] The defendant complained that despite the absence of pleadings in the plaintiff's statement of claim, the learned judicial commissioner had considered the construction of the word 'relocation' as meaning 'vacant possession'.

[61] The plaintiff's response is that the issue had been specifically pleaded.

[62] The above submissions render it necessary for me to analyse the plaintiff's statement of claim, which I shall tabulate as follows:

Para in Statement of Claim	Issue Pleaded
3.2	Special condition 1 of the SPA, in particular the relocation of school.
3.4	Parties' joint inspection of the land.
3.25	The execution of the SPA between the plaintiff and the defendant. The school has been relocated.
4.1	Written acknowledgment by the defendant's representative of the relocation of the school.

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1.3	Plaintiff's right to forfeit 10% of the purchase price under clause 12 of the SPA.

[63] In the light of the above pleadings, it is abundantly clear to me that the defendant's submission on the pleading point is wholly without merit

CONSTRUCTION OF DOCUMENTS

[64] For the purpose of construing special conditions 1 and 3 of the SPA as alluded to above, I find it essential to refer to the material words in special condition 3 viz: 'From the date that the Vendor *confirms in writing that vacant possession is ready to be delivered to the Purchaser* pursuant to cl 1 above and *upon inspection and confirmation by the Purchaser* …'.

[65] In my judgment, reading special conditions 1 and 3 together, vacant possession is deemed to be given upon the happening of two events viz:

(1) The vendor (the plaintiff) informs the purchaser (the defendant) that vacant possession is ready to be delivered; and

(2) Upon inspection and confirmation by the purchaser (the defendant).

[66] Determination of these two events would require an analysis of the factual background.

[67] By letter dated 16 November 2005, the plaintiff's solicitors had duly informed the defendant's solicitors that the plaintiff was ready to deliver vacant possession and set a date and time for inspection. The defendant's solicitors however changed the date for inspection to 21 November 2005 and gave the name of one Yiap Toon Cheng as the defendant's representative.

[68] On 21 November 2005, the defendant's representative inspected the site and penned the relocation confirmation.

[69] By letter dated 22 November 2005 to the defendant's solicitors, the plaintiff's solicitors confirmed the above and stated accordingly that the completion date would be 21 March 2006 ie four months to settle the balance of the purchase price.

[70] By letter dated 29 November 2005, the defendant's solicitors replied, confirming the contents of the letter from the plaintiff's solicitors dated 22 November 2005. However they added a proviso that the defendant was entitled to use the school and that the school should not be dismantled.

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[71] The plaintiff's solicitors replied by letter dated 21 December 2005, agreeing to the defendant's take-over of the school building at the price of RM20,000. However, this take-over was 'not a condition precedent' to the delivery of vacant possession. They then confirmed once again the said completion date ie 21 March 2006.

[72] Upon a true construction of special conditions 1 and 3 in the SPA and the correspondence between the parties' respective solicitors, I am of the view that vacant possession was ready to be delivered on 21 November 2005 and that the completion date was 21 March 2006, with an automatic extension of two months.

[73] The date on which vacant possession must be given is the completion of the sale and purchase which, according to item 10 of the schedule to the SPA and of special condition 1, is when the balance of the purchase price is paid ie four months plus two months from the date when the plaintiff confirmed that they were ready to give vacant possession and after inspection and confirmation by the defendant.

[74] The plaintiff had stated that 'vacant possession is ready to be given' on 16 November 2005 and the inspection and confirmation by the defendant had been effected on 21 November 2005.

[75] The balance of the purchase price had to be paid within four plus two months from 21 November 2005 ie latest by 21 May 2006 as the extended completion date. However, the defendant has not done so.

DEFENDANT'S ALTERNATIVE CONTENTION

[76] The defendant had alternatively contended that the plaintiff had only given the defendant vacant possession, not on 21 November 2005, but on 28 February 2006 when the key to the fourth gate was given to the defendant. Even by taking this date of 28 February 2006, delivery of vacant possession of the land by the plaintiff to the defendant was still clearly some three months before the completion date ie 21 May 2006 when the defendant has to effect payment of the balance of the purchase price, but has failed to do so.

CONCLUSION

[77] On the foregoing grounds, I am of the view that the learned judicial commissioner has arrived at the correct decision under O 14A. I hereby dismiss the defendant's appeal with costs and affirm the orders enumerated at the outset of my judgment. Deposit to the plaintiff on account of taxed costs.

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Zainun Ali JCA:

[78] I have read the judgment of my learned brother, Low Hop Bing JCA in this appeal and my response is as appended below.

[79] Both the factual background and facts including the reliefs sought have been clearly set out by His Lordship. Thus I shall dispense with them here, save where they appear necessary and relevant in the context of my judgment.

THE MOTION ENCLOSURE 24(a)

[80] At the start of hearing of the appeal proper, Mr Segaram, counsel for the appellant moved the court to hear his motion in encl 24(a). Enclosure 24(a) filed on 22 August 2007, is a motion to adduce further evidence under r 7 of the Rules of the Courts of Appeal and s 69 of the Court of Judicature Act 1964.

[81] It is Mr Segaram's case that the evidence which he sought to produce and be admitted are those exhibits in YTC-1 to YTC-5.

[82] Mr Segaram intimated that these documents were not available at the time of hearing of the Order 14A application before the High Court.

[83] In invoking the principle found in *Ladd v Marshall* [1954] 1 WLR 1489, Mr Segaram submitted that all these letters (exhs YTC-1 to YTC-5) go towards proving that the school was still on the premises and that the respondent had failed to comply with its obligation under the agreement and therefore vacant possession had not taken place.

[84] It is Mr Segaram's case that if one were to carefully peruse the contents of some of these letters, particularly YTC-4 and YTC-5, the refutation of certain assertions therein clearly indicate that there is a dispute. In short, the date of vacant possession is in dispute.

[85] After having heard learned counsel for the respondent, DP Vijandran, who said that these documents were already available earlier, and that therefore the appellant should not be allowed their motion in encl 24(a), and after having considered both parties' submissions in their entirety, we gave order in terms of the appellant's motion in encl 24(a).

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[86] Exhibits YTC-1 to YTC-5 in encl 24(a) now form part of the appeal record.

[87] However, as the facts of this matter unfold, my view is that the reception of the said evidence is encl 24(a) was unnecessary.

FACTUAL BACKGROUND

[88] Briefly the appellant and respondent entered into a sale and purchase agreement on 19 November 2004 ('the agreement') in consideration of RM33.5m, where the appellant agreed to buy and the respondent agreed to sell the land with an area of 5.8274 hectares or 14.4 acres, with 40 squatters and a school known as Sekolah Rendah Hwa Nan ('the school') thereon.

[89] The agreement contained special conditions (1) and (3) which require compliance.

[90] In special condition (1) the respondent was to evict 40 squatters and relocate the school from the land.

[91] The respondent had duly performed both these requirements. This had been confirmed and acknowledged by the appellant's representative upon the joint inspection of the said land on 21 November 2005, together with the respondent's representatives as required under special condition (3).

[92] Special condition (3) states that from the date the respondent confirms in writing that vacant possession of the land is ready to be delivered to the appellant and upon inspection and confirmation by the appellant; the appellant shall have four months from the said date to settle the balance of the purchase price to the respondent. The appellant is given an automatic extension of two months in which to pay the balance of the purchase price on condition that the appellant pay late interest to the respondent.

[93] Since the school and its attendant issues seem to be central to the question before the court, a short description of the school would be helpful.

[94] The school occupied 0.75 acres or about 5% of the total land area, which is 14.4 acres. The school had four gates. Three of the gates were open, giving unlimited access to the premises to the appellant. However the fourth gate was not open due to its proximity to a busy road. The key to the fourth gate was given to the appellant only on 28 February 2006 upon its request.

SEQUENCE OF EVENTS

[95] On 16 November 2005 the respondent's solicitors wrote to the

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appellant's solicitors that their clients were ready to deliver vacant possession of the land. A date and time was set by the respondent for inspection of the site. However, the date for the said inspection was altered to the 21 November 2005, at the appellant's request through its solicitors. The appellant named one Yiap Toon Cheng as the appellant's representative for this purpose.

[96] On 21 November 2005, the said Mr Yiap together with the respondent's representative inspected the site. He acknowledged this in these terms:

> I have jointly inspected the school site with Mr Edwin Tan and Mr Tang and confirm that the school administration had been relocated.

[97] The next day, the respondent's solicitors by a letter dated 22 November 2005, wrote to the appellant's solicitor confirming the above and stated that accordingly the completion date will fall on 21 March 2006. (ie when balance of the full payment is due).

[98] The appellant's solicitors by letter dated 29 November 2005 replied, accepting the contents of the said letter from the respondent's solicitors.

[99] The appellant added a proviso to the effect that it be allowed to use the school house and for the said school not to be dismantled.

[100] The respondent's solicitors replied in a letter of 21 December 2005, agreeing that the appellant take over the school building upon payment of a purchase price of RM20,000. However the respondent stated in clear terms that this sale of RM20,000 was 'not a condition precedent' to the handing over of vacant possession.

[101] The respondent once again stated and confirmed that the completion date was 21 March 2006. The appellant accepted this proposition. Thereafter the appellant took possession of the premises and commenced construction works thereon.

[102] However on 8 March 2006, ie about a fortnight before the completion date (when balance payment is due), the appellant's solicitors, out of the blue, disputed the date of handing over of vacant possession and date of completion, alleging that vacant possession was only delivered to them on 28 February 2006, ie the date when the key to the fourth gate was given them by the respondent.

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[103] Arguably, this would mean that the completion date (in the appellant's estimation), would fall approximately on 28 June 2006, with two months extension.

[104] Try as they might, the respondent and appellant were unable to resolve the issue between them. Following this impasse the respondent then filed this suit on 28 August 2006.

[105] Subsequently the respondent by way of an O 14A application sought, inter alia, the court's determination with regard to the construction of the sale and purchase agreement dated 19 November 2006 entered into between the parties. Of particular interest would be the construction to be given to cl 12 and special conditions No (1) and (3) of the agreement, to determine when the respondent had to deliver vacant possession of the respondent's land and further for a declaration of paras (a)–(g) of the statement of claim.

[106] In so far as the respondent is concerned, this vexed question as to what was the date that vacant possession was in fact given, is obviously a pure question of interpretation and construction of the agreement and admitted documents, which could be determined by the court under O 14A of the Rules of the High Court 1980.

[107] Predictably, the appellant took an opposite stance. The appellant contends that what the respondent sought to determine is no more than a determination of fact, namely on what date did the respondent deliver vacant possession of the land to the appellant. The appellant submitted that therefore the respondent's O 14A application is inappropriate when it is clear that the manifest object of O 14A is only with regard to the court's determination of a question of law or construction of any document arising in any cause or matter without a full trial and such determination will finally determine the cause or matter.

[108] The appellant also contends that more importantly the respondent's O 14A application is further jeopardised since it is replete with serious disputes as to material facts.

[109] The appellant cited several authorities to support this argument. They are inter alia:

(i) *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu* [2004] 1 MLJ 8;

(ii) *Seruan Gemilang Makmur Sdn Bhd v Badan Perhubungan UMNO Negeri Pahang* [2004] LNS 55; and

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(iii) *Federal Insurance Co v Nakano Singapore (Pte) Ltd* [1992] 1 SLR 390.

[110] The appellant went on to argue that even if O 14A is appropriate, the respondents had not fully complied with its requirements. This is evident when there is no question of law framed by the appellant. Neither was there a specific question on the construction of the agreement forwarded by the respondent to the court for consideration.

[111] The appellant cited *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu* [2004] 1 MLJ 8 and *Lekaz Constructions Sdn Bhd v KOP Petroleum Sdn Bhd* [2003] 4 CLJ 377 in support of this contention.

[112] The appellant further submitted that the points of law to be determined should be discernible from the pleadings, ie the statement of claim and defence. But since the appellant had yet to file its defence at the hearing of the O 14A application, the learned judicial commissioner in the court below could not have sufficiently identified the relevant issues arising from the action, without the benefit of the appellant's defence.

[113] The appellant submitted that in the absence of its defence, the learned judicial commissioner confined himself merely to the averments of the respondent in its statement of claim (see *Watson & Anor v Dutton Forshaw Motor Group Ltd & Ors* EWCA, 22 July 1998 Court of Appeal).

[114] The appellant also found fault with the respondent's affidavits affirmed by one Dato' Tan Eng Boon and one Tang Pei Hua respectively, since they deposed to such facts as are not within their own personal knowledge and they would therefore not be in a position to personally verify the facts. Among others, this relates to the fact that the school administration had allegedly moved out from the school premises.

[115] The appellant contends that since the nature of an O 14A application will finally determine the rights of parties, affidavits such as those affirmed by Dato' Tan Eng Boon and Tang Pei Hua, based on hearsay as it were, should not be admissible. Thus in this connection, the issue regarding the date of delivery of vacant possession of the school ought to be determined in a full trial.

[116] The appellant did not also find favour with the respondent being allowed to argue non-pleaded issues. This arose when at the hearing in the High Court, the respondent's counsel raised the issue that under special conditions No (1) and (3) of the agreement '*to relocate the school must be construed as 'to move the school to a new premise', thus confirming that the date*

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of delivery of vacant possession was on 21st November 2005'. The appellant contended that the respondent did not plead this in its pleadings.

[117] The question that looms large is this. Is the issue regarding the date when vacant possession is to be given to the appellant, (based on the relevant clauses of the agreement and joint acts of inspection and confirmation of parties) a question of fact, OR is it a question of law or construction as envisaged under O 14A?

[118] Order 14A reads as follows:

> (1) The Court may upon the application of a party or of its own motion determine any question of law or *construction of any document* arising in any cause or matter at any stage of the proceedings where it appears to the Court that —
>
> (a) such question is suitable for determination without the full trial of the action; and
>
> (b) such determination will finally determine the entire cause or matter or any claim or issue therein.
>
> (Emphasis added.)

[119] It is the appellant's case that the determination of the date of vacant possession is no more than a question of fact, rendering an O 14A application wholly inappropriate.

[120] To compound the problem, the appellant also made it clear that there are disputed questions of fact involved, disentitling the respondent from making an application under O 14A.

[121] Let us now look at the said 'disputed questions of fact'.

DISPUTED QUESTIONS OF FACT

(a) The appellant's first allegation of 'disputed fact' concerns the school's relocation. The appellant contended that the school was not relocated by 21 November 2005.

However this 'dispute' becomes irrelevant in the light of the acknowledgment by the appellant's representative, Mr Yiap Toon Cheng, who in clear terms on 21 November 2005, confirmed the school's relocation.

(b) The appellant's second allegation of fact in dispute relates to the written acknowledgment given by the said appellant's representative, Mr Yiap Toon Cheng. The appellant contended that the said written

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acknowledgment by Yiap after the joint inspection did not amount to vacant possession being given on 21 November 2005 since Yiap had merely said:

> … I have jointly inspected the school site with Mr Edwin Tan and Mr Tang and confirm that the school administration had been relocated.

My view is that the purpose of the joint inspection as provided in the agreement was to ascertain whether the school had been relocated to another site. Mr Yiap's acknowledgment that it had, is clear and unequivocal. The question is, in the light of cl (3) of the agreement, does the joint inspection and confirmation of the school's relocation amount to vacant possession being given on 21 November 2005? The respondent says it does. If the appellant contended otherwise, then this issue can only be determined on a proper interpretation and construction of the act of acknowledgment by the appellant's representative on 21 November 2005, taken and read in conjunction with the respondent's letter dated 16 November 2005 and the subsequent confirmation thereof through letters dated 17 November 2005, 22 November 2005 and 21 December 2005.

(c) The appellant's third allegation of 'disputed fact' is that the school did not allow unrestricted access to the school after 21 November 2005.

Surely this allegation is to be treated with askance, in the light of the appellant's commencement of construction works on the premises. If vacant possession had not already been given as appellant contended this could only mean that the appellant had been trespassing on the said premises.

(d) The fourth allegation of 'disputed fact' relates to the issue that the appellant was given keys to the school only on 28 February 2006, thus precluding access to the premises.

I find this contention baseless and misleading. Considering that three of the four gates were not locked, the question of accessibility is a non-issue, a fortiori when considering that the appellant had begun construction works on the premises. It was only the fourth gate which remained locked, due to its proximity to a busy road. Upon its request, the key to the fourth gate was given to the appellant on 28 February 2006.

Now, flying in the face of the appellant's own conduct and letters to the contrary, the appellant contend that vacant possession was given to them only on 28 February 2006, ie the date the key to the fourth gate was given. This also means that in so far as the

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appellant was concerned, the date of completion is consequently shifted to 28 June 2006, plus two months extension.

(e) The appellant's fifth allegation of 'disputed fact' relates to the central issue of the date when vacant possession was given. The appellant took the position that it was not given on 21 November 2005 as submitted by the respondent but only on 28 February 2006.

It is evident that the respondent's letters spoke in clear terms regarding confirmation of the date of vacant possession being 21 November 2005, which was not only NOT challenged by the appellant, it was in fact ACCEPTED by the appellant in its letters.

It is of course banal to state that any denial, objection or challenge, should there be any, ought to be made promptly.

As Lord Esher MR in *Wiedeman v Walpole* [1891] 2 QB 534 tersely observed:

> … if one man of business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer it if he means to dispute the fact that he did so agree.

Clearly the appellant's lack of promptness in objecting to the contents of the respondent's letters as to the date and vacant possession and date of completion, now works against the appellant. More importantly, the appellant's clear acceptance of the contents of the respondent's letters did not reconcile with the appellant's later and subsequent position denying them.

(f) The appellant's sixth issue concerns the problem of its representative Mr Yiap Toon Cheng having to contact the school's administrators to seek permission to access the school compound.

[122] This latest non-issue thought up by the appellant reinforces my view that the alleged disputes of fact are largely misconceived, since the said 'disputes of fact' relate to the problems the school had with the respondent. The appellant is not privy to the understanding or agreement which the respondent had long had with the school and its administrators.

[123] For the appellant to now take advantage of the school's problems with the respondent merely to show existence of facts in dispute, manifests the appellant's machinations in trying to put off paying the balance of the purchase price. It is also irrelevant, since the appellant had nothing to do with the respondent's problems with the school.

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[124] In any event the sixth alleged 'dispute of fact' has no bearing whatsoever on the question of interpretation as to the date of vacant possession.

[125] It would appear that the alleged 'disputes of fact' are contrived by the appellant, as an afterthought. In any case, the alleged 'disputes of fact' have been sufficiently addressed by the learned judicial commissioner in his judgment.

[126] Such being the position, the next question is whether this matter can be resolved through the O 14A regime.

[127] What then is the ambit of O 14A?

[128] The English Court of Appeal, in reviewing the scope of O 14A in the unreported 1994 case of *Korso Finance Establishment Anstat v John Wedge*, inter alia, had this to say:

(1) An issue is a disputed point of fact or law relied on by way of claim or defence.

(2) A question of construction is capable of constituting an issue.

(3) If a question of construction will finally determine whether an important issue is suitable for determination under O 14A and where it is a dominate feature of the case, a court ought to proceed to so determine such issue.

[129] Then again in *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu* [2004] 1 MLJ 8, our Court of Appeal observed that:

> … In our view even if the case appears to be or is complicated it does not mean that the court must shun away from considering the applicability of O 14A and O 33 r 2 in relation to the questions of law posed which are clear and definite and the issues are clear cut. Real and serious attempt must be made to identify the material facts pleaded which are obviously undisputed or which should not have been disputed and then to apply the relevant rule to the facts as found.

[130] My view is that the question of what or when is the date of vacant possession in this case, depends very much on how one interprets or construes the terms of the agreement. A simplistic approach such as that taken by the appellant, where it was argued that it merely bears on it being a question of fact, makes for a superficial understanding of the question posed for the court's determination under O 14A.

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[131] In that regard my view is that this matter is suitable and appropriate to be considered within the dynamics of the O 14A regime.

[132] Under O 14A, the court can resolve issues of fact by examining such 'facts' in order 'to ascertain whether the allegations made are inherently incredible or patently inconsistent with contemporaneous documents' (per Court of Appeal in *Hock Hua Bank v Yong Liuk Thin* [1995] 2 MLJ 213).

[133] Before I proceed further, my view is that it is necessary to firstly address a pertinent point raised by the appellant as alluded to earlier. It is this; since the appellant had yet to file its defence, the appellant contends that the learned judicial commissioner had not had the benefit of reading the entire pleadings and was confined to reading only the statement of claim.

[134] The appellant's vigorous argument is that this is not what is contemplated under O 14A since the arbiter must be fully appraised of the issues therein which can be discerned only when the defence is filed.

[135] However, authorities such as *Watson & Anor v Dutton Forshaw Motor Group Ltd v Ors* [1998] EWCA 3245 22 July 1998 CA indicate that applications under O 14A is to decide clear points of law or construction apparent on the pleadings. 'Pleadings' as defined in the Rules of the High Court 1980 merely says it 'does not include petitions summons or preliminary act'.

[136] Pleadings therefore cover a wide spectrum of the cause papers. The court can avail itself to the affidavits in support for example, which would depose the material facts relating to the questions of law or construction to be determined by the court. In the instant appeal, the affidavits filed bear testimony to the unequivocal factual events. The court is competent to identify the material facts pleaded and conclude that they should not have been disputed at all or otherwise.

[137] In this connection one has to envisage the purport of O 14A, which is that where it appears to any party that a question of law or construction is apparent on the pleadings and determination by the court will finally dispose of the matter, this order can be invoked without the necessity of having to wait for the defence to be filed or waiting for the gamut of case management to take place and finalised. Waiting for these would defeat the very reason for the existence of the order. Apart from the requisite provisions in the order, as long as the statement of claim is clear, as are the affidavits in support as

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regards the question of law or construction to be determined, which would finally dispose of the matter, the court's power for summary disposal under this order is assured.

[138] The said approach, read with the express terms of the order which specify that applications can be made 'at any stage of the proceedings' is to be distinguished from the provision of other orders in the Rules of the High Court 1980, which expressed that applications can be made only after 'pleadings are closed'.

[139] As succinctly put by Lightman J in *Mohamed v Alaga & Co* [1998] 2 All ER 720:

> … Under Order 14A, the court can decide any question of law at any stage of the proceedings if that question is suitable for determination without a full trial of the action and such determination will finally determine the entire action or any claim or issue therein. Order 14A is accordingly not apt for determining a question which involves a question of fact. (Emphasis added.)

[140] This point is reinforced in the case of *Muhamad Zain bin Sidek v Suruhanjaya Perkhidmatan Awam Malaysia* [2002] MLJU 779 where Syed Helmy J observed that:

> … It should be borne in mind that O 14A was introduced to cater for situations where points of law (and not facts) are fit for summary disposal. …
>
> The position of an application under O 14A is similar to that under O 14 in that it should be made only if the court thinks it is a plain case and ought not to go for trial ...

[141] Thus if a party has a simple matter of construction to be determined such as in the instant appeal, the court in such summary application should decide what in its judgment is the true construction and effect thereof (see *Esso Standard Malaysia Berhad v Southern Cross Airways (Malaysia) Bhd* [1972] 2 MLJ 168).

[142] Then again, in *MP-Bilt Pte Ltd v Oey Widarto* [1999] 3 SLR 592, a Singapore case involving the sale and purchase of a condominium unit where the developer sued the purchaser to recover unpaid progress payment, and the developer subsequently applied under O 14 r 12 (which is equivalent to our O 14A), the court below based as it were, on the statement of claim and supporting affidavits, gave the purchaser unconditional leave to defend. The developer appealed. GP Selvam J had this to say:

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> .... Order 14 r 12 was introduced to enable the court to effect summary disposal of cases by determining any question of law or construction arising in any cause or matter at any stage of the proceedings. This is an implementation of a recent and present movement towards a speedy solution to civil disputes where oral evidence is unnecessary. The new procedure should be put to use in cases where all relevant and necessary evidence is documentary …

[143] Clearly from all these authorities, the appellant's proposition that a defence must first be filed before the court can hear an application under O 14A is misconceived.

[144] The scope of O 14A is such that 'real and serious attempt must be made to identify the material facts pleaded which are obviously undisputed or which should not have been disputed and then to apply the relevant rule to the facts as found' (see *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu* [2004] 1 MLJ 8 (CA)).

[145] In the *Petroleum* case above, the Court of Appeal found that the trial judge had failed to identify the material facts which are disputed or undisputed or which ought not to have been disputed.

[146] The appellant contends that the disputes of fact are apparent from the affidavits.

[147] So how does one treat the issue of conflict of evidence on affidavits as are said by the appellant to exist in the instant case?

[148] My view is that the principles applicable to affidavits in an O 14 application is equally applicable to an O 14A application.

[149] Lord Diplock in the Privy Council decision of *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212 observed that:

> … Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as rising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be.

[150] In the same vein, it is trite that a mere assertion in an affidavit of a given situation, which is to be the foundation of a defence, does not provide leave to defend. It is imperative for the court to look at the whole situation

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and ask itself whether the defendant has satisfied the court that there is a reasonable probability of the defendant having a bona fide defence.

[151] It is my view that the learned judicial commissioner in the court below had identified and made a more than adequate appraisal of the material facts pleaded in the instant appeal and found them to be obviously undisputed.

[152] I agree with the findings of the learned judicial commissioner. As was clearly stated in *The Supreme Court Practice of 1999* (Singapore):

> …Where the court is satisfied that there are no issues of fact between the parties, it would be pointless to give leave to defend on the basis that there's a triable issue of law, and this is so even if the issue of law is complex and highly arguable.

(See *The Supreme Court Practice 1999* para 14/4/12).

[153] This principle was approved and applied in cases such as *European Asian Bank AG v Punjab and Sind Bank (No 2)* [1983] 2 All ER 508 and more recently in the Singapore Court of Appeal in *Tokyo Investment Pte Ltd & Anor v Tan Chor Thing* [1993] 3 SLR 170.

[154] It is also competent to take another approach to this matter.

[155] What can also be discerned is that upon a proper and true construction for the handing over of vacant possession, anxious scrutiny must be had to the relevant clauses in the agreement. Under cl 1 of the special conditions, the vendor is given nine months with an extension of three months, 'to relocate the school in order to hand over vacant possession of the said property to the purchaser'.

[156] The period prescribed is 'in order to hand over vacant possession'. No actual reference is made for any time period for the actual handing over.

[157] The material part of cl 3 reads as follows:

> From the date that the vendors confirms in writing that vacant possession is ready to be delivered to the Purchaser pursuant to Clause 1 above and upon inspection and confirmation by the Purchaser, the Purchaser shall be given four (4) months from the date thereof to settle the balance of the Purchaser Price to the Vendor, with an automatic extension of two (2) months …

So under this clause the vendor is required to confirm in writing that vacant possession 'is ready to be delivered' pursuant to cl 1.

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[158] So at which point in time can it be said that the vendor is in a state of 'readiness' to deliver vacant possession pursuant to cl 1?

[159] Clearly it occurs when the school has been relocated as required under cl 1. It does not, ipso facto, state that vacant possession must be physically delivered at that time.

[160] In other words, upon relocation of the school, the respondent is set and prepared and ready to deliver vacant possession. This is to be followed by inspection and confirmation by the appellant that the school had indeed been relocated.

[161] Even after the said inspection and confirmation of the same, the agreement does not prescribe any time frame for delivery of vacant possession.

[162] The point of time at which vacant possession must be delivered is contained in cl 6 of the agreement which reads:

> The sale and purchase herein is free from encumbrances and with vacant possession to be given to the Purchaser on completion of the Sale and Purchase herein.

Which means that vacant possession must be given upon completion of the sale and purchase (item 10 of the Schedule and cl 1 of the special conditions) ie when the balance of that purchase price is paid ie four months plus two months from the time the respondents confirmed that they were ready to give vacant possession and inspection had been held.

[163] On 16 November 2005 the respondent had intimated that 'vacant possession is ready to be given'. But the inspection and confirmation by the appellant was completed only on 21 November 2005, at the appellant's behest.

[164] The balance of the purchase price had then to be paid within four plus two months from 21 November 2005 ie at the latest, on 21 May 2006. Vacant possession is to be given only after the balance purchase price is paid ie on or before 21 May 2006.

[165] If this was the case, then vacant possession is to be given only on 21 May 2006, when the balance of the purchase price was to be paid. However, the appellant contend that vacant possession was only given on 28 February 2006 when the key to the fourth gate was given. Even if this is accepted, on the basis of this interpretation, the respondent had in actual fact given vacant possession long before the due date.

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OTHER POINTS RAISED IN THE MEMORANDUM OF APPEAL PARAGRAPH 4(c)

[166] This approach was not presented on these terms at the High Court stage, but since this is not a new but an alternative interpretation on the same documents and facts which were before the High Court, this is not a new point raised.

[167] Section 69(1) of the Courts of Judicature Act 1964 clearly provides that a appeal to the Court of Appeal shall be by way of re-hearing.

[168] As succinctly put by Gopal Sri Ram JCA in *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719 (at p 739):

> … the categories of cases in which an appellate court will admit a new point are not closed. The governing principle is this: an appellate court will permit a new point to be raised for the first time before it where the interests of justice so require. The question whether the interests of justice are met on a particular case depends on the peculiar facts of that case. The factor for and against the admission of the new point must be weighed on a balance to see where the justice of the case lies.

[169] In fact the Federal Court said this with greater intensity in *Morello Sdn Bhd v Jacques (International) Sdn Bhd* [1995] 1 MLJ 577, when it observed (at p 588):

> ... It is clear law that an appellate court is more likely to entertain a new point if it relates to a matter which had been before the court of trial, for example a new argument based ... upon the construction of a document or upon facts admitted or proved beyond controversy.

[170] My view is that this court is entitled to look for the true construction of this matter albeit when the respondent had posed cl 12 and special conditions (1) and (3) for determination. In that regard I find that the appellant's contention that the respondent had failed to pose a question of law or construction for the court's determination, to be baseless.

PARAGRAPH 4(e) AND (h) MEMORANDUM OF APPEAL

[171] The appellant's submission that the deponents were incompetent to attest the said affidavits are untenable since the essential facts relied on by the respondent were not hearsay. They were attested to by persons who had personal knowledge of the same.

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PARAGRAPH 4(i) MEMORANDUM OF APPEAL

[172] This allegation is unfounded since the issue on the school's relocation had been pleaded by the respondent at paragraph 3.5 and 4.1 (see pp 25–26 of the record of the appeal).

[173] Clearly the respondent's O 14A application is appropriate since the question of the construction of relevant clauses pertaining to vacant possession in the agreement is a central feature of the dispute between the parties.

[174] It is my view that O 14A gives leverage to the court to finally determine issues such as questions of law or construction which may finally be determined without the need for a full trial of the action.

[175] On a final note, it might be noted that the O 14A regime is largely put in place to enable courts to effectuate speedy solutions to civil disputes where oral evidence is unnecessary.

[176] In fact the courts are encouraged to enforce the rigours of the order, particularly in commercial and construction cases 'where cash flow is the life blood to make commerce work' (per GP Selvam J in *MP-Bilt Pte Ltd v Oey Widarto* [1999] 3 SLR 592).

[177] In my view, for as long as it is clear that the legal requirements are in place, the court should not be diffident in confronting the issues in an O 14A application.

[178] After considering this appeal in its entirety, my view is that the respondent's application under O 14A seeking the courts' determination on a point of construction of the relevant clauses in the agreement pertaining to the date of vacant possession is pertinent and is in order.

[179] Consequently my view is that the appellant's appeal is to be dismissed with costs.

Defendant's appeal dismissed with costs by majority.

Reported by Loo Lai Mee